

82 - 2012

Office - Supreme Court, U.S.  
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ALEXANDER L. STEVAS,  
CLERK

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED  
STATES

1982 TERM

ALBERT T. EHLERS

V.

CITY OF DECATUR, GEORGIA

\* \* \*

ON APPEAL FROM UNITED STATES DISTRICT  
COURT, NORTHERN DISTRICT OF GEORGIA,  
ATLANTA DIVISION; ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT.

\* \* \*

BRIEF OF APPELLANT  
ALBERT T. EHLERS

ALBERT T. EHLERS, PRO SE  
3142 ARGONNE DR. N. W.  
ATLANTA, GA., 30305  
TELEPHONE 404-237-9514

QUESTIONS PRESENTED FOR  
REVIEW

Whether an attorney, who as a pro se successful litigant in an action for deprivation of his civil rights (42 USC 1983), is barred from the recovery of attorney fees for his time and efforts under 42 USC Sec. 1988.

Whether, the facts that the attorney tried, but could not obtain other legal representation are of significance in a construction of 42 USC Sec. 1988.

Whether, the trial court erred in partially denying an award pursuant to 42 USC Sec. 1988 to outside counsel for his time in litigating the award of attorney fees.

Whether, when such legal services are required to maintain such a lawsuit and to obtain a reversal of the District Court by the Court of Appeals, the wrongdoer is entitled to a windfall in not being required to pay for such services pursuant to 42 USC Sec. 1988 simply because they were not performed by another attorney other than the pro se litigant attorney.

Whether the chances of more litigation are outweighed by chances of fewer civil rights violations and the effect of F.R.C.P. 68 in balancing the issue of allowing pro se attorney compensation under 42 USC Sec. 1988.

CERTIFICATE OF INTERESTED  
PERSONS

Certificate is hereby made that the following are all of the persons who may have a direct interest in the outcome of this case:

1.

Albert T. Ehlers  
3142 Argonne Dr., N. W.  
Atlanta, Georgia, 30305

2.

Robert John Genins, Jr. Esquire  
Box 14303  
Atlanta, Ga., 30324

3.

City of Decatur, Georgia  
C/O H. A. Stephens, Esquire  
Arnall & Stephens  
Suite 200

236 Sycamore Street

Decatur, Georgia, 30030

In addition all those persons and/or entities which may deprive others of their Constitutional rights and those attorneys who may seek to vindicate same by appearing in propria persona may have an interest in the outcome of this case.

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OPINIONS AND/OR JUDGMENTS  
RENDERED IN THE CASE

The order or judgment of the U. S. District Court was entered on Dec. 21, 1981 and appears at Appendix A in Appendices.

The order of the Court of Appeals, Eleventh Circuit was entered on Jan. 3, 1983 and appears at Appendix B in Appendices.

The order of the Court of Appeals, Eleventh Circuit, denying rehearing was entered on Feb. 25, 1983 and appears at Appendix C in Appendices.

JURISDICTION

This petition for certiorari was filed less than 90 days from date of aforesaid. The jurisdiction of the Court is invoked pursuant to 28 USC Sec. 1254 (1).

## STATEMENT OF THE CASE

Record entails one volume and a transcript. References herein shall be to the record and page number as "R p.\_" and to the transcript and page number as "T p.\_".

Defendant enacted an ordinance prohibiting an owner of property from placing a "For Rent" sign on his property. After three attorneys refused to handle Plaintiff's case he filed suit pro se, alleging Defendant had removed his "For Rent" sign pursuant to said ordinance in violation of his civil rights. Defendant denied same. (R P. 4-5,10, 157.)

The District Court summarily adjudicated the case in favor of Defendant's contention that a condition precedent to any suit against a municipality was a Georgia statute requiring ante litem notice. R p. 31-32.

The Fifth Circuit reversed holding the statute was an exhaustion of remedies requirement which a state could not use to burden access to the federal courts in suits seeking damages in a 42 USC Sec. 1983 action.

R p. 38-40.

Throughout this time, December, 1977 thru March 1980, and thereafter until the case was calendered for trial, Plaintiff, who is an attorney (R p. 115), represented himself.

The jury returned a verdict upon which judgment was entered for the full amount Plaintiff contended he had lost as rentals because of the sign ordinance designed to frustrate black persons from moving into the city. R p. 47, 92 and 93.

That amount was \$990. Legal fees were not submitted to the jury. T p. 39.

Defendant continued to require legal services by a motion for judgment notwithstanding the verdict and in opposition to Plaintiff's request for attorney fees for himself and for his counsel. R p. 94-106 and 110-182.

Defendant never made any offer to Plaintiff. R p. 157.

The District Court's opinion was that although Plaintiff was an attorney he was <sup>barred</sup> was/

from any recovery under 42 USC Sec. 1988 for his pro se work in litigation as a matter of law. R p. 173, T p. 2-3. The trial court stated Plaintiff had proceeded very ably and deserved a considerable amount of credit. T p. 3, and 39.

#### REASONS FOR GRANTING THE WRIT

The panel decision in the Circuit Court (holding that the appeal of the lower court's denial of an award for pro se attorney fees (appellant) was barred by appellant's acceptance of attorney fees awarded for services performed by another) is contrary to the following decisions of the Supreme Court of the United States and precedents of the Fifth Circuit Court of Appeals of the United States; and in order to follow the former's mandate and the latter's precedents and maintain uniformity of decisions a Writ of Certiorari should be granted.

B & G Electric Co. v. G. E. Bass & Co., Inc., 252 F.2d 698, 700 (5th Cir. 1958);

Embry v. Palmer, 107 U.S. 3, 8 (1882);

Gilfillan v. McKee, 169 U. S. 303, 312,  
16 S. Ct. 6, 40 L.Ed. 161(1)(1895);

Kaiser v. Standard Oil Co., 89 F.2d  
58,59 (5th Cir. 1937);

Shaffer v. Great American Indem. Co.,  
147 F.2d 981, (5th Cir. 1945);

Snow v. Hazelwood, 179 F 182 (5th Cir.  
1910).

## CONCLUSION

The amount paid into court by Defendant and paid to Plaintiff "is not in controversy in this case". *Gilfillan v. McKee*, & *Embry v. Palmer*, *supra*.

The inadequacy of the award to Plaintiff's retained counsel has not been waived by the payment. There is nothing to indicate it was paid into court as an attempted accord and satisfaction. *United States v. Hougham*, *supra*. (Please also compare *McGowan v. King, inc.*, 616 F.2d 745, 747 (5th Cir. 1980))

Plaintiff was entitled to what was paid "irrespective of the outcome of the appeal" and the legal services for which compensation was paid are not involved. *B&G Electric Co. v. G. E. Bass & Co., Inc.*, *Kaiser v. Standard Oil Co.*, *Snow v. Hazlewood*, *Shaffer v. Great American Indem. Co.*, *supra*.

Manifestly, the purpose of 42 USC Sec. 1983 is to provide redress for governmental interferences with constitutional liberties.

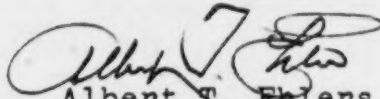
Petitioner respectfully submits, it could not have been the intention of Congress when enacting 42 USC Sec. 1988 to exclude attorney pro se litigants from its comprehension and give violators of constitutional rights a wind-fall of not having to pay attorneys fees for their prosecution simply because an outside attorney didnot handle the case for the prosecutor.

Petitioner respectfully submits this Court should decide the unprecedented issue that 42 USC Sec. 1988 does not preclude the award of pro se attorney fees to an attorney litigant and that the time required to establish such a principle is compensable.

Petitioner respectfully submits that under the facts of this case, when he could not obtain outside counsel, there should be no reason to not allow him compensation pursuant to 42 USC Sec. 1988 for the time required of him by Defendant to maintain this case.

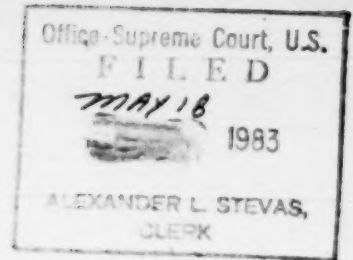
At any time Defendant could have made a FRCP 68 offer. Defendants "are entitled to resist vigorously. The right to determined contest, however, has a concomitant duty; the obligation to pay reasonably for the effort that a defense exacts from opposing counsel if the claim proves to be meritorious". Knighton v. Watkins, 616 F 2d 795, 799 (5th Cir. 1980).

Respectfully submitted:

  
Albert T. Ehlers  
Pro Se

3142 Argonne Dr. N. W.  
Atlanta, Ga. 30305  
May 27, 1983.

82 - 2012



NO. \_\_\_\_\_  
\_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED  
STATES

1982 TERM

ALBERT T. EHLERS

V.

CITY OF DECATUR, GEORGIA

\* \* \*

ON APPEAL FROM UNITED STATES DISTRICT  
COURT, NORTHERN DISTRICT OF GEORGIA,  
ATLANTA DIVISION; ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT.

\* \* \*

APPENDICES

ALBERT T. EHLERS, PRO SE  
3142 ARGONNE DR. N. W.  
ATLANTA, GEORGIA 30305  
TEL. 404-237-9514

APPENDIX A  
JUDGMENT OF DISTRICT COURT

Judgment of Decision by the  
Court

UNITED STATES DISTRICT COURT

For the

Northern District of  
Georgia

Civil Action File No.  
C77-1895A

ALBERT T. EHLERS

v.

JUDGMENT

CITY OF DECATUR, GEORGIA

This action came on for consideration before the Court, Honorable Harold L. Murphy United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudge that the Plaintiff ALBERT T. EHLERS recover of defendant CITY OF DECATUR, GEORGIA, the amount of FIVE-THOUSAND ONE-HUNDRED TWENTY-SEVEN & 50/100 (\$5,127.50) attorney's fees for services by Mr. Genins and expenses in the amount of TWO-HUNDRED THIRTY-ONE & 50/100 (\$231.50).

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

ALBERT T. EHLERS  
Plaintiff

CIVIL ACTION  
NO. C 77-1895A

v.

CITY OF DECATUR, GEORGIA  
Defendant

ORDER

This case is before the Court upon the Motion of plaintiff, Albert T. Ehlers, for attorney's fees and expenses arising from this civil rights action.

Plaintiff's cause of action arose under 42 USC Sec. 1983 for deprivation of property without due process of law and a denial of his right not to have his freedom of speech abridged. Specifically plaintiff contended such constitutional deprivations occurred as a result of a sign ordinance passed by defendant which prohibited him from advertising his property for rent. See *Linmark Assoc., Inc. v. Township of Willingboro*, 431 US 85 (1977).

In 1975 plaintiff placed a "For Rent" sign on his property in Decatur, Georgia, in violation of a city ordinance that prohibited such signs. City police removed the sign, and in 1977 Ehlers brought this suit for damages under 42 USC Sec. 1983. This court granted summary judgment for the city on the ground that Ehlers had not complied with Georgia's ante-litem notice statute, Ga. Code Ann. Par. 69-308, and plaintiff appealed.

In *Ehlers v. City of Decatur*, 614 F2d 54 (5th Cir. 1980) this Court was reversed with the court on appeal holding:

"Federal courts may not require exhaustion of state administrative or judicial remedies in a Par. 1983 action for damages for deprivation of a constitutional right. *Monroe v. Pape*, 365 US 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961); *Wells Fargo Armored Serv. Corp. v. Georgia Public Serv. Comm'n* 547 F2d 938, 939-940 n.1 (5th Cir. 1977); *Bryant v. Potts*, 528 F2d 621 (5th Cir. 1976). States may not statutorily burden access to the federal courts with requirements

federal courts themselves are prohibited from imposing. U.S. Const. art. VI, cl. 2 (Supremacy Clause). Contrast *De Almanza v. Laredo Water Works Syst.*, 582 F2d 970 (5th Cir. 1978) (ante-litem notice constitutional as applied to state law claim in diversity suit).

Georgia's ante-litem notice requirement therefore may not constitutionally be applied to this Par. 1983 action for damages for deprivation of a constitutional right."

This case was tried before a jury and a verdict in favor of plaintiff for \$990.00 damages was returned.

Plaintiff filed this action pro se and handled the action on that basis until March 1981 when he employed attorney, John Genins, to represent him in the case. The plaintiff, Albert T. Ehlers is himself a licensed attorney in the State of Georgia.

Plaintiff now seeks expenses, attorney's fees for representing himself as a pro se litigant and attorney's fees for work performed by attorney John Genins in this action.

The Civil Rights Attorney's Fees Award Act of 1976, 42 USC Sec. 1988, provides that the district court may, in its discretion, award the prevailing party in a civil rights suit reasonable attorney's fees. Generally, the prevailing plaintiff should recover an attorney's fee unless special circumstances would render such an award unjust. *Criterion Club of Albany v. Board of Commissioners*, 594 F2d 118, 120 (5th Cir. 1979); *Morrow v. Dillard*, 580 F2d 1284, 1300 (5th Cir. 1978); *Gore v. Turner*, 563 F2d 159, 163 (5th Cir. 1977).

In his complaint the plaintiff sought damages for loss of rentals, loss of time and punitive damages.

At the time this case was tried the issue of the potential liability of a municipal corporation for punitive damages in a civil rights case was pending before the Supreme Court. At trial this Court submitted the issue of punitive damages to the jury and informed counsel that such an award, if made,

could be considered by the court upon appropriate motion to the court. While the Supreme Court has now ruled upon that issue, no punitive damages were awarded to plaintiff by the jury in this case. *City of Newport v. Fact Concerts, Inc.*, 49 USLW 4860 (1981).

At trial the evidence showed the loss of rentals to plaintiff to be \$990.00, the award made by the jury verdict in the case.

While plaintiff did not prevail upon the issue of punitive damages, it is clear that he is the prevailing party and is entitled to recover expenses and reasonable attorney's fees, not limited by the amount of the damages awarded by the jury. *Harkless v. Sweeny Independent School District et al.*, 608 F.2d 594 (5th Cir. 1979).

\* \* \* \* \* (Remaining portion of order is taken up with how the court arrived at the monetary value of Mr. Genins services and is thought to have no relevancy on denial of prose attorney fees to plaintiff litigant). \* \*

\* \* \*

ACCORDINGLY, the Clerk will enter judgment in favor of plaintiff and against defendant for \$5,127.50 attorney's fees for services by Mr. Genins, and \$231.50 expenses for a total of \$5,359.00; and, plaintiff's prayers for attorney's fees for representing himself are denied.

IT IS SO ORDERED, this 17th day of December, 1981.

/s/ Harold L. Murphy  
United States District  
Judge.

APPENDIX B

OPINION OF COURT OF APPEALS  
ELEVENTH CIRCUIT

IN THE UNITED STATES COURT OF  
APPEALS

FOR THE ELEVENTH CIRCUIT

' DO NOT '  
' PUBLISH '

\_\_\_\_\_  
NO. 82-8119  
Non-Argument Calendar  
\_\_\_\_\_

ALBERT T. EHLERS  
Plaintiff-Appellant,  
v.

CITY OF DECATUR, GEORGIA  
Defendant-Appellee

\_\_\_\_\_  
APPEAL FROM THE UNITED STATES DISTRICT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
\_\_\_\_\_

(January 3, 1983)

Before HILL, KRAVITCH AND HENDERSON, Circuit  
Judges.

PER CURIAM

Appellant brought a 42 USC Sec. 1983 action against Appellee, the City of Decatur, for deprivation of property without due process of law. Appellee had confiscated Appellant's "For Rent" sign because its display violated a city ordinance. The district court granted summary judgment to the city because appellant had failed to comply with Georgia's ante-litem notice statute, then Ga. Code Ann. Par. 69-308. The former Fifth Circuit reversed, *Ehlers v. City of Decatur*, 614 F. 2d (5th Cir. 1980), holding that the Georgia statute was not applicable to a Sec. 1983 action brought in federal court. The action was then tried to a jury, and appellant was awarded \$990.00 in damages.

Until the final stages of the action at the trial level, appellant, a licensed attorney in the State of Georgia, appeared pro se. His motion for attorney's fees sought \$20,000 for the legal work he had performed himself and an additional \$7,500 for services per-

formed by the attorney retained by appellant in the latter stages of the litigation.

Relying on *Cofield v. City of Atlanta*, 648 F.2d 986 (5th Cir. 1981), the district declined to award attorney's fees for the work performed by appellant as a pro se litigant. *Cofield* held that 42 USC Sec. 1988 does not allow the award of attorney's fees to pro se litigants. Neither the *Cofield* court nor the lower court here, however, addressed the question whether a pro se litigant who is a practicing attorney is entitled to fees in appropriate circumstances under Sec 1988.

The district court evaluated the services rendered by appellant's retained counsel in accordance with the guidelines set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F2d 714, 719 (5th Cir. 1974) and awarded a total of \$5,127.50 for those services. The appellee paid that amount into the registry of the court, and appellant subsequently accepted payment from the clerk.

Appellant now contends that the court erred in not awarding him attorney's fees for his services also. He contends that Cofield does not resolve the issue against him, and directs our attention to Barrett v. Bureau of Customs, 651 F 2d. 1087 (5th Cir. 1981). The Barrett court held that under the Freedom of Information Act a pro se litigant who was not an attorney may not recover attorney's fees, but expressly left open the question whether an attorney who appears in his own behalf may recover fees for work he performs.

We need not reach the appellant's contentions, however intriguing they might be. Appellant's acceptance of the attorney's fees award from the clerk of the court acts as a bar to this appeal. In Cherokee Nation v. United States, 355 F. 2d 945, 174 Ct. Cl. 131 (Ct. Cl. 1966), the Court of Claims held that "a party cannot accept the benefits of a judgment, order or decree and afterwards prosecute an appeal or writ of error to review.

This general rule applies only where the acceptance has been voluntary and intentional." Id. at 949 (citations omitted; holding that under facts of that case, attorneys accepted attorney's fees award under circumstances of strong compulsion and financial duress and thus were not estopped from appealing amount of the award.

Appellant has not argued that his acceptance of the fee award was involuntary or forced upon him by circumstances of duress. Assuming therefore that his acceptance was voluntary and intentional, we hold that he is barred from appealing the amount of the award.

AFFIRMED.

APPENDIX C

Opinion of Court of Appeals  
Denying Rehearing

IN THE UNITED STATES COURT  
OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-8119

ALBERT T. EHLERS,

Plaintiff-Appellant,

versus

CITY OF DECATUR, GEORGIA

Defendant-Appellee

-----  
Appeal from the United States District  
Court for the Northern District of  
Georgia  
-----

ON PETITION FOR REHEARING AND SUGGESTION FOR  
REHEARING EN BANK

(Opinion January 3, 11 Cir., 1983

(Feb. 25, 1983)

Before HILL, KRAVITCH AND HENDERSON,  
Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is Denied

\* \* \* \* , the suggestion for Rehearing En

is DENIED.

ENTERED FOR THE COURT:

/s/Phyllis Kravitch  
United States Circuit Judge

CERTIFICATE OF SERVICE

The foregoing Petition for a Writ of certiorari has been this day May 31, 1983 served on the attorney representing Defendant litigants in this case by depositing three copies thereof in the U. S. Mails having proper postage thereon and enclosed in an envelope addressed to:

H. A. Stephens, Jr., Esquire  
246 Sycamore Street  
Suite 200  
Decatur, Ga. 30030.

No. 82-2012

Office - Supreme Court, U.S.
FILED
JUL 6 1983
ALEXANDER L. STEVAS.
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

ALBERT T. EHLERS,  
*Petitioner,*

VS.

CITY OF DECATUR, GEORGIA,  
*Respondent.*

**RESPONDENT'S BRIEF**  
**In Opposition to Petition for a Writ of Certiorari**  
**to the**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE ELEVENTH CIRCUIT**

HOSEA ALEXANDER STEPHENS  
246 Sycamore Street  
Suite 200  
Decatur, Georgia 30030  
(404) 373-0123  
*Attorney for Respondent*

THOMAS O. DAVIS  
201 Trust Building  
Decatur, Georgia 30030  
Of Counsel

## **QUESTIONS PRESENTED FOR REVIEW**

May a litigant prosecute an appeal from the denial of a Rule 59, FRCP, Motion For Reconsideration of a portion of a judgment after having accepted the benefits of that portion of such judgment favorable to his contentions?

## **CERTIFICATE REQUIRED BY RULE 34(1)(b)**

The undersigned, counsel of record for Respondent, certifies that the following listed parties have an interest in the outcome of this case.

Albert T. Ehlers  
Robert John Genins  
Thomas O. Davis  
H. A. Stephens, Jr.  
Ann Crichton  
Steve Johnson  
Bob Carpenter  
J. Lamb Johnston  
Ted O'Callaghan  
M. A. Smith  
Jack W. Collins

Every citizen, resident, and  
taxpayer of the City of  
Decatur, Georgia

**HOSEA ALEXANDER STEPHENS**  
Attorney for Respondent

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No. 82-2012

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1982

---

ALBERT T. EHLERS,

*Petitioner,*

vs.

CITY OF DECATUR, GEORGIA,

*Respondent.*

---

**RESPONDENT'S BRIEF**

**In Opposition to Petition for a Writ of Certiorari  
to the**

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

---

**STATEMENT OF THE CASE**

The only issue addressed by the Eleventh Circuit Court of Appeals being the effects flowing from acceptance by Petitioner of funds paid into the registry of the District Court by Respondent in satisfaction of the judgment entered against it, no detailed statement of the case is deemed necessary. The crux of its holding lies in the following quotation from the Court's opinion [P.App. 11]:

"Appellant's acceptance of the attorney's fees award from the clerk of the court acts as a bar to this appeal."

No other issue having been reached or discussed by the Eleventh Circuit Court of Appeals, factual background of the controversy and its procedural history are totally without relevance.

## REASON FOR DENYING THE WRIT

The decision of the Eleventh Circuit Court of Appeals accords with this Honorable Court's decision in *Donovan v. Penn Shipping Co., Inc.*, (1977), 429 U.S. 648, 97 S.Ct. 835, 51 L.Ed. 2d 112, the decision of the Court of Claims in *Cherokee Nation v. United States*, (Ct.Cl.), 355 F.2d 945, 174 Ct.Cl. 131, and holdings of other courts.

## SUMMARY OF ARGUMENT

By accepting from the Clerk payment of the funds paid by defendant in satisfaction of the judgments entered on the verdict of the jury and Order of the Court awarding attorney's fees, Plaintiff waived any right to appeal from denial of his Rule 59 Motion to alter or amend.

4 *American Jurisprudence 2d*, § 250, p.745

4 *CJS, Appeal & Error*, § 215, p. 644

*Cherokee Nation v. United States*, (1966) Ct. Cl.), 355 F.2d 945, 949, 174 Ct. Cl. 131

*Donovan v. Penn Shipping Co., Inc.*, (1977), 429 U.S. 648, 97 S. Ct. 835, 51 L.Ed 2d 112

*Krahn v. B. F. Goodrich Company, et al* 5 Cir. 559 F. 2d 308

## LAW AND ARGUMENT

### I.

#### **Petitioner Waived Any Right To Appeal Denial Of The Motion To Alter Or Amend By Accepting The Funds Deposited In The Registry Of The Court In Satisfaction Of The Judgments**

In *Donovan v. Penn Shipping Co., Inc.*, (1977) 429 U.S. 648, 97 S. Ct. 835, 51 L.Ed. 2d 112, this Honorable Court held:

“----a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted.”

Views of text-writers and other courts are in accord.

In 4 *American Jurisprudence* 2d, §250, p.745, the general principle is stated:

“A party who accepts an award or legal advantage under an order, judgment, or decree ordinarily waives his right to any such review of the adjudication as may again put in issue his right to the benefit which he has accepted. This is so even though the judgment, decree, or order may have been generally unfavorable to the appellant.”

More broadly expressed is the statement appearing in 4 *CJS, Appeal & Error*, §215, p. 644:

“It is a rule of general application that a party cannot accept the benefits of a judgment, order, or decree and afterward prosecute an appeal or writ of error to review it; he cannot, in case of independent provisions, accept the benefits of the part which is favorable and appeal from the part which is unfavorable; nor can he, making such acceptance, reserve the right to appeal.”

The foregoing was quoted and applied in *Cherokee Nation v. United States*, (Ct.Cl.), 355 F.2d 945, 949, 174 Ct. Cl. 131.

Donovan, *supra*, was followed by the Fifth Circuit Court of Appeals in *Krahn v. B.F. Goodrich Company, et al*, (1977), 5 Cir., 559 F.2d 308.

## II.

### **Decisions Relied Upon By Petitioner Are Distinguishable**

*Gilfillan v. McKee*, (1895), 169 U.S. 303, 40 L.Ed 161, 16 S. Ct. 6, involved separate decrees against two separate funds. The decree was also several, the interest of each defendant thereunder being separate and distinct. Here, the judgment was entered in favor of Petitioner against Respondent for "attorney's fees for services by Mr. Genins" -- there was no separate judgment in favor of Mr. Genins.

*Kaiser v. Standard Oil Co. of New Jersey*, (1937), (5 Cir.), 89 F.2d 58, is actually adverse to appellant's contentions, as evidenced by the following excerpt from the opinion (p. 59):

"Accepting the fruits of a judgment and thereafter appealing therefrom are totally inconsistent positions, and the election to pursue one course is deemed an abandonment of the other."

In *B & G Electric Company v. G.E. Bass & Company, Inc.*, 5 Cir. 1958, 252 F.2d 698, while the appeal of *B & G Electric Company* was permitted to proceed procedurally the judgment of which it complained was affirmed on the the merits.

*Shaffer v. Great American Indemnity Co.*, 5 Cir., 1945, 147 F.2d 981, involved workers' compensation benefits as to which there was ongoing liability, and vastly differing facts.

Furthermore, all of the foregoing ante-dated this Honorable Court's decision in *Donovan supra*, which Respondent submits constitutes controlling authority.

Respondent respectfully submits the Petition for a Writ of Certiorari in this case should be denied.

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